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Attorneys for Plaintiff, BARRY ROSEN

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BARRY ROSEN,

Plaintiff,

vs.

MICHAEL "MIKE" MEDLIN DBA  
AFFORDABLE AUTOGRAPHS,  
AFFORDABLE AUTOGRAPH SHOL  
LYWOOD; HOLLYWOOD SHOW,  
LLC, A CALIFORNIA LIMITED  
LIABILITY COMPANY; AND  
DOES 1-10.

Defendants.

HOLLYWOOD SHOW, LLC, A  
CALIFORNIA LIMITED  
LIABILITY COMPANY,

Counter-Claimant,

vs.

Case No.: 2:15-cv-05789-ODW-JC

Assigned to the Honorable Otis D.  
Wright, II

**COUNTER-DEFENDANT  
BARRY ROSEN'S ANSWER TO  
DEFENDANT HOLLYWOOD  
SHOW, LLC'S  
COUNTERCLAIM AND  
DEMAND FOR JURY TRIAL**

1 BARRY ROSEN,

2 Counter-Defendant.

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4  
5  
6 COMES NOW Plaintiff/Counter-Defendant BARRY ROSEN (hereinafter “Rosen”  
7 or “Counter-defendant”), to answer Defendant and Counter-claimant HOLLYWOOD  
8 SHOW LLC’S (hereinafter “Hollywood Show” or “Counter-claimant) Counterclaim:

9 **COUNTERCLAIM FOR DECLARATION OF NONINFRINGEMENT AND**  
10 **SCOPE OF COPYRIGHT**

11 1. Counter-defendant admits that this Counterclaim is brought under Fed. R.  
12 Civ. P. Rule 13 and the allegations in Paragraph 1 of the Counterclaim that the  
13 controversy between Rosen and Hollywood Show concerning the alleged infringement is  
14 ongoing. Counter-defendant denies the allegations in Paragraph 1 of the Counterclaim  
15 that there has ever been a dispute between Hollywood Show and Rosen concerning the  
16 *scope* of the copyrights asserted in this action. Rosen re-asserts here that he owns all  
17 copyrights in the photographs at issue in this case. ((Dkt. No. 25, First Amended  
18 Complaint (“FAC”), ¶ 15) (“...[Rosen] created the two (2) photographic works at  
19 issue...the Photographs consist of material original with [Rosen] and are copyrightable  
20 subject matter. [Rosen] is the owner of all rights, title, and interest in the Photographs.”)<sup>1</sup>  
21 There is no controversy as to the scope of copyright in that Defendant Michael Medlin  
22 admits that he printed Counter-defendant’s photographs off of Google and then re-  
23 sells/resold them. (Dkt. No. 36, ¶ 5.) To the extent these allegations assume any  
24 controversy in excess of what is alleged in the FAC, Counter-defendant denies the  
25

26  
27 <sup>1</sup> “A copyright registration is ‘prima facie evidence of the validity of the copyright and the facts stated in  
28 the certificate.’ 17 U.S.C. § 410(c).” *United Fabrics Int’l, Inc. v. C&J Wear, Inc.*, 630 F. 3d 1255, 1257  
(9th Cir. 2011).

1 allegations set forth in Paragraph 1 of the Counterclaim. Counter-defendant hereby  
2 incorporates by reference the FAC in its entirety.

3 2. To the extent the allegations set forth in Paragraph 2 are determined to be  
4 allegations of law, Counter-defendant is not required to plead a response thereto. To the  
5 extent that such allegations are determined to be allegations of fact, Counter-defendant  
6 admits the allegations set forth in Paragraph 2 of the Counterclaim.

7 3. Counter-defendant admits the allegations set forth in Paragraph 3 of the  
8 Counterclaim.

9 4. Counter-defendant denies the allegations set forth in Paragraph 4 of the  
10 Counterclaim, including but not limited to that it is entitled to a declaration of non-  
11 infringement. Counter-defendant has not asserted a claim for direct copyright  
12 infringement against Hollywood Show in the FAC. Plaintiff asserts only a claim of  
13 *secondary* copyright infringement against Hollywood Show. Paragraph 43 of the FAC  
14 states that “Defendant Hollywood Show had either constructive knowledge, or actual  
15 knowledge, and/or had reason to know of the infringing activity alleged herein and that  
16 Defendant Mike Medlin had no right to copy, upload, display, download, or distribute the  
17 Photographs and consciously disregarded such knowledge.” (Dkt. No. 25, FAC, ¶ 43.)  
18 Further, Counter-defendant alleges that “Defendant Hollywood Show continued to  
19 infringe on Plaintiff’s copyrights *by continuing to allow, induced, facilitated, hosted and*  
20 *encouraged*, Defendant Mike Medlin...” (Dkt. No. 25, FAC, ¶ 45.)

21 5. Counter-defendant denies that Hollywood Show is entitled to a declaratory  
22 judgment as to the scope of any copyrights at issue or to which elements of each  
23 photograph are protectable under federal Copyright law as there is no outstanding  
24 controversy regarding the scope of Rosen’s copyrights in the photographs at issue which  
25 are copyrightable themselves as well as contain original copyrightable elements. Counter-  
26 defendant denies that Hollywood Show is entitled to a declaratory judgment that it has  
27 not infringed and is not infringing and is not otherwise liable for the infringement of the  
28

1 copyright(s) asserted in this action. Hollywood Show offers no **facts** in its Answer to  
2 Rosen's FAC or Counterclaim as to why it would be entitled to such relief. Counter-  
3 defendant denies that the scope of any copyrights asserted in this action are at issue.  
4 Counter-defendant maintains that the FAC is well-pled. In the FAC, Counter-defendant  
5 states that he owns all rights in the copyrights to the photographs at issue and gives the  
6 copyright registration names and numbers to the works. (Dkt. No. 25, FAC, ¶¶ 16, 24.)  
7 Counter-defendant is the owner of all the rights in copyright to the images at issue, he has  
8 not licensed either of them to any entity.

### 9 **AFFIRMATIVE DEFENSES**

#### 10 **FIRST AFFIRMATIVE DEFENSE**

11 Hollywood Show is not entitled to declaratory relief on the issue of the scope of  
12 the copyrights asserted because the scope of the copyrights in the images at issue has not  
13 been disputed by any party, to date. Rosen alleges he owns the entirety of the copyrights  
14 at issue as evidenced by the prima facie case for ownership established by the certificate  
15 of ownership on file with the Copyright Office of the photographs. Hollywood Show  
16 does not raise the issue of the scope of the copyrights owned by Rosen in its Answer  
17 through any of its numerous affirmative defenses. This request for declaratory judgment  
18 relief is the first time the issue of the scope of the copyrights has been raised. As such, it  
19 is not a live justiciable controversy in the instant action and Hollywood Show is not  
20 entitled to a declaratory judgment on this issue.

#### 21 **SECOND AFFIRMATIVE DEFENSE**

22 Hollywood Show is not entitled to a declaratory judgment that it has not infringed  
23 and is not infringing and is not otherwise liable for the infringement of the copyright  
24 asserted in this action. A declaratory judgment on this issue is akin to moving for  
25 summary judgment on the controversy at the core of this case, yet Hollywood Show  
26  
27  
28

1 offers no evidence or proof as to why it believes it has not secondarily infringed.<sup>2</sup>

2  
3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff and Counter-defendant Rosen denies that Counter-  
5 claimant Hollywood Show is entitled to the relief requested and prays for relief as  
6 follows:

- 7 1. That Counter-claimant Hollywood Show take nothing by its Counterclaim(s)  
8 and find in favor of Plaintiff/Counter-defendant on the Counter-claim(s);  
9 2. For attorney's fees and costs; and  
10 3. For such other and further relief as this court deems just and appropriate.

11  
12  
13 Dated: November 20, 2015

LAW OFFICES OF ADAM I. GAFNI

14  
15 By: /s/ Adam I. Gafni

16 Adam I. Gafni

17 Attorneys for Plaintiff

18 Barry Rosen  
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22

23 <sup>2</sup> "In a declaratory judgment action, the party that has the burden of proof is determined not by their  
24 designation as plaintiff or defendant, but by the nature of the relief sought." *Burlington N. R.R. Co. v.*  
25 *Hyundai Merch. Marine Co.*, CV 96-9123-MMM (VAPx), 1999 U.S. Dist. LEXIS 23186, \*17 (C.D. Cal.  
26 June 7, 1999). "Thus, 'where the substantive issue in a declaratory judgment action is one on which the  
27 defendant would bear the burden of affirmative proof were the action brought in traditional form, the  
28 underlying . . . assignment of burdens is not altered.'" *Burlington*, at \*18 (quoting *Union Pacific*  
*Insurance Co. v. Safety Kleen Corp.*, C-89-3119 MHP, 1993 U.S. Dist. LEXIS 1993 21490, \*13 (N.D.  
Cal. Nov. 10, 1993). (Patel, D.J.) (citing *Fireman's Fund Ins. Co. v. Videofreeze Corp.*, 540 F.2d 1171,  
1176 (3d Cir. 1976), cert. denied, 429 U.S. 1053, 50 L. Ed. 2d 770, 97 S. Ct. 767 (1977)).

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury of any and all issues triable with right by a jury pursuant to Rule 38 of the Federal Rules of Civil Procedure.

Dated: November 20, 2015

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By: /s/ Adam I. Gafni

Adam I. Gafni

Attorneys for Plaintiff

Barry Rosen